

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-137-00

PLDarcy

date:

to: District Director, Manhattan
Examination Division
Attn: Mr. Lawrence Paduano

from: District Counsel, Manhattan

subject:

Tax Years Ended November [REDACTED], November [REDACTED], November [REDACTED],
November [REDACTED], November [REDACTED], [REDACTED].

Determination of the Tax Matters Partner

Uniform Issue List # 6229.02-00 and 6231.07-00

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This memorandum responds to your request for advice on determining who may execute a Form 872-P on behalf of [REDACTED] [REDACTED]. ("Partnership"), a New York partnership subject to the uniform partnership audit procedures, I.R.C. § 6221 et. seq. The advice rendered in this memorandum is conditioned on the accuracy of the facts presented to us. This advice is subject to National Office review. We will contact you within two weeks of the date of this memorandum to discuss the National Office's comments, if any, about this advice.

ISSUE:

1. Who may execute a Form 872-P on behalf of the Partnership for the taxable years ended November [REDACTED], November [REDACTED], November [REDACTED], November [REDACTED] and [REDACTED]?

CONCLUSION:

In this case, only the tax matters partner ("TMP") of the Partnership may execute an 872-P. We conclude that [REDACTED] is currently the TMP of the Partnership for the taxable years ended November [REDACTED], November [REDACTED] and November [REDACTED]. For the taxable years ended November [REDACTED], November [REDACTED] and [REDACTED], we conclude that [REDACTED] is currently the Partnership's TMP.

FACTS:

THE ADVICE IS RENDERED ON THE BASIS THAT ALL THE REPRESENTATIONS AND FACTS IN THIS MEMORANDUM ARE CORRECT. WE RECOMMEND THAT YOU VERIFY THIS INFORMATION. IF ANY OF THE REPRESENTATIONS AND/OR FACTS ARE INCORRECT OR CANNOT BE SUBSTANTIATED, WE MAY NEED TO MODIFY OUR ADVICE.

A. INTRODUCTION

The Examination Division is currently auditing the taxable years ended November [REDACTED] through [REDACTED] of the Partnership, a partnership subject to the uniform partnership audit procedures. I.R.C. § 6221 et. seq. The parties seek to extend the statute of limitations on assessment for these periods at the partnership level. You have requested our advice to assist you in identifying who may execute Forms 872-P on behalf of the Partnership. The statute of limitation for the taxable year ended November [REDACTED] expires on [REDACTED]. The statute of limitations for the taxable years ended November [REDACTED] and November [REDACTED] expire on [REDACTED]. The statutes of limitation for the subsequent taxable years expire subsequent to [REDACTED].

In a memorandum dated March 3, 2000, we provided you with advise on this issue. The National Office approved this advice. However, on April 5, 2000, you provided us with additional facts to consider related to [REDACTED], the TMP designated by the Partnership on its Federal partnership income tax returns for the taxable years ended November [REDACTED], November

██████ and ██████. The additional facts do not change the ultimate conclusions set forth in our memorandum of March 3, 2000. However, we believe it prudent to discuss these additional facts. To assist you in responding to a memorandum submitted by the Partnership on ██████ ("Partnership memorandum"), we have attached the body of a proposed letter that you can provide to the Partnership explaining the position of the Internal Revenue Service in this matter.¹

B. The Tax Matters Partner Of The Partnership

On its Federal partnership income tax returns for the taxable years ended November ██████, November ██████ and November ██████, the Partnership designated ██████, in her personal capacity, as the TMP. During these periods, the general partners of the Partnership included ██████ ("██████"), ██████ and various individuals. At the beginning of the tax year ended November ██████, ██████ and other individual general partners ceased to be direct partners of the Partnership. The Partnership memorandum does not give details on this change of partners. However, as a result of this partner change, ██████ and ██████ became the sole general partners of the Partnership.

On its Federal partnership income tax returns for the taxable years ended November ██████ and November ██████, the Partnership designated ██████ as the TMP. During these periods, ██████ was a limited liability company organized under the laws of Delaware. For its tax periods ended November ██████, November ██████ and ██████, ██████ filed Federal partnership income tax returns and was treated as a partnership of Federal tax purposes.

On ██████, ██████ filed an Entity Classification Election ("Form 8832") with the Internal Revenue Service pursuant to the check-the-box regulations contained in Treasury Regulation § 301.7701. On ██████, ██████ filed a Federal corporate income tax return for the short period ██████ to ██████. Also on ██████, the Partnership filed a Federal partnership income tax return, which designated ██████

¹ The Partnership Memorandum is referenced at page 2 of our March 3, 2000 memorandum.

██████ as its TMP.² ██████ remains a viable entity having the same employee identification number. You have advised us that ██████ was not liquidated, dissolved or reorganized under state law. That is, the only relevant change in ██████ subsequent to ██████ is its election to be treated as a corporation for Federal tax purposes.

On ██████, the entire universe of ██████ entities reorganized. As a result of this reorganization, ██████ transferred its assets, including its interest in the Partnership to ██████, a new publicly traded entity. ██████ no longer exists as an entity under state law. Thus, the current general partners of the Partnership are ██████ and ██████.

Prior to ██████, ██████ was operated through a Management Committee. During ██████, the Management Committee of ██████ was renamed the Executive Committee. The Executive Committee was comprised of former general partners of the Partnership and officers of ██████. On ██████, the Executive Committee of ██████ passed the following resolution ostensibly designating a new TMP of the Partnership:

The Executive Committee designates ██████ as the TMP with respect to the Internal Revenue Service examination of the United States Partnership Income Tax Returns of [the Partnership] for the fiscal years ended November ██████, ██████; November ██████, ██████; November ██████, ██████; and November ██████, ██████. ██████ in her capacity of Executive Vice President will act on behalf of ██████.

(hereinafter we refer to this document as the "Executive Committee Resolution"). ██████ executed the Executive Committee Resolution on behalf of the Executive Committee. At the time, ██████ was the Executive Vice Chairman of ██████ and the member of the Executive Committee who generally dealt with tax matters. Shortly thereafter, in ██████, ██████

² In our memorandum of March 3, 2000, we simply stated that "██████ still remains in existence." At the time, we were not aware of its election to be treated as a corporation for Federal tax purposes.

██████ submitted the Executive Committee Resolution to the Examination Division. The Partnership never filed the Executive Committee Resolution with any Internal Revenue Service service center.

DISCUSSION:

1. THE PROPER PERSON TO EXECUTE INTERNAL REVENUE SERVICE FORMS 872-P ON BEHALF OF THE PARTNERSHIP FOR THE TAXABLE YEARS ENDED NOVEMBER ██████, NOVEMBER ██████ AND NOVEMBER ██████

The Partnership's Federal partnership income tax returns for the taxable years ended November ██████, November ██████ and November ██████ specifically designated ██████, in her personal capacity, as the TMP. We believe that ██████, in her personal capacity as TMP, is the only proper party to execute any Forms 872-P for these taxable years. I.R.C. § 6229(b)(1)(B). However, ██████ does not want to execute future Forms 872-P and the Partnership has argued that ██████ may execute all future Forms 872-P for these periods. We advise you that for the taxable years ended November ██████, November ██████ and November ██████, you should only accept Forms 872-P executed by ██████, individually as TMP, unless, and until, the Partnership properly designates a new TMP or gives another person the authority to execute a valid Form 872-P.

Pursuant to I.R.C. § 6229(b)(1)(B) the Internal Revenue Service can extend the statute of limitations with respect to the assessment of partnership items by entering into an agreement with the tax matters partner (or any other person authorized by the partnership in writing to enter into such an agreement) before the expiration of such period. (Emphasis added). Treasury Regulation § 301.6229(b)-1 states that:

Any partnership may authorize any person to extend the period described in section 6229(a) with respect to all partners by filing a statement to that effect with the service center with which the partnership return is filed. The statement shall:

- (a) Provide that it is an authorization for a person other than the TMP to extend the assessment period with respect to all partners,

- (b) Identify the partnership and the person being authorized by name, address, and taxpayer identification number,
- (c) Specify the partnership taxable year or years for which the authorization is effective, and
- (d) Be signed by all persons who were general partners at any time during the year or years for which the authorization is effective.

We do not believe the Executive Committee Resolution complies with Treasury Regulation § 301.6229(b)-1. First, the Partnership never filed this document with the service center where it filed its Federal partnership income tax returns. Second, this document does not specifically authorize [REDACTED] to extend the assessment period with respect to all partners as required by Treasury Regulation § 301.6229(b)-1(a). Third, the document does not identify [REDACTED]'s address and taxpayer identification number as required by Treasury Regulation § 301.6229(b)-1(b). Finally, the document is executed only by a representative of the [REDACTED]'s Executive Committee and not by "all persons who were general partners at any time during the year...for which the authorization is effective (emphasis added)" as required by Treasury Regulation § 301.6229(b)-1(d). Since the Partnership never authorized a person other than the TMP to execute a Form 872-P for the taxable years ended November [REDACTED], November [REDACTED] and November [REDACTED], only the TMP can execute a Form 872-P for these years.³

³ The Partnership has stated that in November [REDACTED] and again in November [REDACTED], each general partner of the Partnership executed a Power of Attorney and Consent ("POA") authorizing a member of [REDACTED] to act on their behalf with respect to the Partnership. The authority of [REDACTED]'s Management Committee to act in this case is a complex issue involving a number of factual inquiries. As a threshold matter, we would have obtained executed copies of each POA. However, we conclude that the contents of the Executive Committee Resolution do not comply with the relevant Treasury Regulations of §§ 301.6229(b)-1 nor 301.6231(a)(7)-1. Thus, we do not believe it necessary to discuss whether or not the Executive Committee of [REDACTED] had the authority to act on behalf of the Partnership. Even if the Executive Committee had such authority, as discussed above, the Executive Committee Resolution is deficient.

2. WHO IS THE PARTNERSHIP'S TMP FOR THE TAXABLE YEARS ENDED NOVEMBER [REDACTED], NOVEMBER [REDACTED] AND NOVEMBER [REDACTED]

Pursuant to Treasury Regulation § 301.6231(a)(7)-1(a) a partnership may designate a partner as its TMP or revoke a current TMP's status only as provided for in Treasury Regulation § 301.6231(a)(7)-1. (Emphasis added). On its Federal partnership income tax returns for the taxable years ended November [REDACTED], November [REDACTED] and November [REDACTED], the Partnership properly designated [REDACTED] as its TMP. Treas. Reg. § 301.6231(a)(7)-1(c). [REDACTED]'s designation as TMP for these taxable years remains in effect until such time as she properly resigns as TMP pursuant to Treasury Regulation § 301.6231(a)(7)-1(i); the Partnership makes a valid designation of a new TMP pursuant to Treasury Regulations §§ 301.6231(a)(7)-1(d), (e) or (f); or the Partnership revokes [REDACTED]'s TMP designation pursuant to Treasury Regulation § 301.6231(a)(7)-1(j).⁴ Treas. Reg. §§ 301.6231(a)(7)-1(L)(1)(v)(A-C). Although the Partnership argues that it complied with the provisions of Treasury Regulations §§ 301.6231(a)(7)-1(d) and (e), we disagree.

Pursuant to Treasury Regulation § 301.6231(a)(7)-1(e), a partnership may designate a TMP for a specific taxable year at any time after the filing of its Federal partnership income tax return for that taxable year by filing a statement with the service center with which the Federal partnership income tax return was filed. According to the Treasury Regulations, this statement shall:

⁴ Treasury Regulation § 301.6231(a)(7)-1(j) permits the Partnership to revoke [REDACTED]'s TMP designation by filing a statement of revocation with the service center. The content requirements of such a revocation essentially mirror those of Treasury Regulation § 301.6231(a)(7)-1(e) dealing with designating a TMP. Since the Partnership has not filed any document purporting to revoke [REDACTED]'s TMP status, we will not provide a detailed discussion on the revocation issue. However, we do conclude that the Executive Committee Resolution submitted by the Partnership does not constitute a revocation of [REDACTED]'s TMP status pursuant to Treasury Regulation § 301.6231(a)(7)-1(j). Additionally, [REDACTED] never executed any document that the Internal Revenue Service could reasonably consider a resignation under Treasury Regulation § 301.6231(a)(7)-1(i).

- (1) Identify the Partnership and the designated partner by name, address, and taxpayer identification number;
- (2) Specify the Partnership taxable year to which the designation relates;
- (3) Declare that it is a designation of a TMP for the taxable years specified; and
- (4) Be signed by persons who were general partners at the close of the year and were shown on the return for that year to hold more than 50 percent of the aggregate interest in partnership profits held by all general partners as of the close of that taxable year.

The Executive Committee Resolution purporting to designate [REDACTED] as the new TMP clearly does not comply with Treasury Regulation § 301.6231(a)(7)-1(e) and, therefore, is not effective. The Partnership never filed the designation with the service center where it filed its Federal partnership income tax returns. Furthermore, the designation does not identify [REDACTED]'s address and taxpayer identification number as required by Treasury Regulation § 301.6231(a)(7)-1(e)(1).

Most important, the designation is executed only by [REDACTED], as a representative of [REDACTED], and not by "persons who were general partners at the close of the year and were shown on the return for that year to hold more than 50 percent of the aggregate interest in partnership profits held by all general partners as of the close of that taxable year" as required by Treasury Regulation § 301.6231(a)(7)-1(e)(4). The Partnership appears to assume that [REDACTED]'s signature can substitute for the Treasury Regulation's requirement that any designation be signed by the general partners holding more than 50 percent of the aggregate interest in the Partnership's profits. We cannot find any legal authority to support any such claim. Accordingly, we do not believe that the Partnership properly designated [REDACTED] as TMP for these periods.

The Partnership further argues that [REDACTED], as TMP, properly "designated" a new TMP by tendering the Executive Committee Resolution to the District Director. Treasury Regulation § 301.6231(a)(7)-1(d) permits a current TMP to certify that a new TMP has been properly selected. Treasury Regulation § 301.6231(a)(7)-1(d) does not permit a TMP to actually designate

a new TMP. Pursuant to Treasury Regulation §301.6231(a)(7)-1(d), the current tax matters partner shall make the certification by filing with the service center with which the Partnership return is filed a statement that--

(1) Identifies the Partnership, the partner filing the statement, and the successor tax matters partner by name, address, and taxpayer identification number;

(2) Specifies the Partnership taxable year to which the designation relates;

(3) Declares that the partner filing the statement has been properly designated as the tax matters partner of the Partnership for the Partnership taxable year and that that designation is in effect immediately before the filing of the statement;

(4) Certifies that the other named partner has been selected as the tax matters partner of the Partnership for that taxable year in accordance with the Partnership's procedure for making that selection; and

(5) Is signed by the partner filing the statement.

The Executive Committee Resolution purporting to certify [REDACTED] as the new TMP clearly does not comply with Treasury Regulation § 301.6231(a)(7)-1(d) and, therefore, is not effective. First, it does not provide [REDACTED]'s address and taxpayer identification number as required by Treasury Regulation § 301.6231(a)(7)-1(d)(1). Second, it does not specifically certify that [REDACTED] has been selected as the TMP in accordance with the Partnership's procedure for making that selection as required by Treasury Regulation § 301.6231(a)(7)-1(d)(1)(4). Finally, it was not signed by [REDACTED], the partner filing the statement, as required by Treasury Regulation § 301.6231(a)(7)-1(d)(1)(5).

3. WHO IS THE PARTNERSHIP'S TMP FOR THE TAXABLE YEARS ENDED NOVEMBER [REDACTED], NOVEMBER [REDACTED] AND [REDACTED], [REDACTED]

On its Federal partnership income tax returns for the taxable years ended November [REDACTED], November [REDACTED] and [REDACTED], the Partnership properly designated [REDACTED] as its TMP. Treas. Reg. § 301.6231(a)(7)-1(c). [REDACTED], L.L.C.'s designation as TMP for these taxable years remains in effect until such time as it properly resigns as TMP pursuant to Treasury Regulation § 301.6231(a)(7)-1(i); the Partnership makes a valid designation of a new TMP pursuant to Treasury Regulations §§ 301.6231(a)(7)-1(d), (e) or (f); or the Partnership revokes [REDACTED]'s TMP designation pursuant to Treasury Regulation § 301.6231(a)(7)-1(j). None of these events occurred.

Additionally, the TMP status of [REDACTED] would terminate if it liquidated or dissolved. Treas. Reg. §§ 301.6231(a)(7)-1(L)(1)(iii) and (v)(A-C). We do not believe that [REDACTED] change in filing status pursuant to the check-the-box regulations on [REDACTED] constitutes a "liquidation or dissolution" for the purposes of Treasury Regulation §§ 301.6231(a)(7)-1(L)(1)(iii). The check-the-box regulations set forth a step-by-step analysis for determining the appropriate federal tax classification of an entity. Under the check-the-box regulations, an eligible entity with at least two members can elect to be classified as either a partnership or as a corporation. Treas. Reg. § 301.7701-3.⁵ [REDACTED] still remains in existence and we find nothing in the check-the-box regulations that would warrant a conclusion that [REDACTED]'s election to change its tax filing status constitutes a liquidation or dissolution under Treasury Regulation § 301.6231(a)(7)-1(L)(1)(iii). Thus, we conclude that [REDACTED] remains the Partnership's TMP for the taxable years ended November [REDACTED], November [REDACTED] and [REDACTED].

⁵ In this memorandum, we do not give any opinion on whether [REDACTED] is an eligible entity under the check-the box regulations or whether it properly complied with the procedural rules set forth in Treasury Regulation § 301.7701(b)-8. If requested, we will gladly provide advise on this issue.

4. GENERAL MATTERS

As a final matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the extension, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed extension to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event an extension becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, please note that Section 3461 of the Restructuring and Reform Act of 1998, codified in Section 6501(c)(4)(B), requires Internal Revenue Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Internal Revenue Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Pub. 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the statute extension. Alternatively, you may advise the taxpayer orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. In any event, you should document your actions in this regard in the case file.

CC:NER:MAN:TL-N-137-00

We again remind you that this advice, including the proposed letter to the taxpayer attached hereto, is subject to review by the National Office. As discussed on page one, we will contact you within two weeks of the date of this memorandum to discuss any comments the National Office may have regarding this advice. Should you have any questions regarding this matter, please contact Paul Darcy at (212) 264-5473 extension 256.

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